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7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 ELECTRONIC ARTS INC.,

12 Plaintiff,

13 v.

14 TEXTRON INC., BELL HELICOPTER
TEXTRON INC. and TEXTRON
15 INNOVATIONS INC.,

16 Defendants.
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Case No. CV-12-0118-WHA

**OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, STAY OR TRANSFER**

Date: April 26, 2012
Time: 8:00 a.m.
Ctmm: 8, 19th Floor
Judge: Hon. William H. Alsup

Date Comp. Filed: January 6, 2012

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OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE,
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I. INTRODUCTION

Seven weeks after Plaintiff Electronic Arts Inc. (“EA”) filed this trademark and trade dress action (the “California Action”), Defendants Textron Innovations Inc. and Bell Helicopter Textron Inc. filed a mirror-image action in the Northern District of Texas (the “Texas Action”). The Texas Action concerns the same expressive work (EA’s videogame *Battlefield 3*), the same purported trademarks and trade dress for three Bell-manufactured helicopters, and the same federal and constitutional issues regarding EA’s rights to use those purported marks in its expressive work. EA has moved the Texas court to transfer the Texas Action to this Court under the first-to-file rule, or, in the alternative, for convenience under 28 U.S.C. § 1404(a). The parties will complete briefing on EA’s Texas motion by April 16, 2012 and a hearing may be held thereafter at the discretion of the Texas court.

Days after filing the Texas Action, Textron¹ filed this motion to dismiss, stay or transfer EA’s first-filed action. Textron’s three largely-redundant arguments for legitimizing their subsequently-filed action fail, and its motion therefore should be denied.

First, EA properly filed this declaratory judgment action following Textron’s threats of litigation. EA had a right to seek judicial relief from the cloud of allegations Textron had placed over its newly released expressive work, *Battlefield 3*. EA’s action was not improperly anticipatory. It was filed nearly two months after EA rejected Textron’s initial licensing demand and more than two weeks after receiving Textron’s subsequent letter containing a general threat of “legal remedies.”

Second, Textron has provided no legitimate basis for departing from the first-to-file rule. EA did not “race to the courthouse” to beat a deadline set by Textron, nor did it engage in ruse settlement negotiations to delay Textron’s filing. A justiciable dispute has existed between the parties since November 7, 2011, and either party properly could have filed an action since that date. Textron’s allegations of forum shopping and bad faith are similarly meritless. EA filed the

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¹ Hereafter, EA refers to Defendants Textron Inc., Textron Innovations Inc. and Bell Helicopter Textron Inc. collectively as “Textron.”

1 California Action in its home forum where a significant portion of the conduct at issue occurred,
 2 and did not engage in bad faith tactics by seeking relief once it was clear that the parties had a
 3 justiciable dispute.

4 Third, Textron fails to meet its burden of demonstrating that the Northern District of
 5 Texas would be a more appropriate venue for this action. Textron has previously filed multiple
 6 lawsuits in California attempting to enforce its purported trademark and trade dress rights. By
 7 availing itself of the California courts—including the Northern District of California, where EA
 8 is located and this action was filed—Textron confirms that California courts are convenient fora.
 9 Moreover, Textron Innovations—owner of the purported marks at issue and the plaintiff in five
 10 of the Texas Action’s six claims—is a **Rhode Island** company. It cannot claim that Texas is a
 11 demonstrably more convenient forum than California. Finally, numerous party and third party
 12 witnesses are located in California. EA employees and documents relating to EA’s marketing,
 13 public relations, online resources and licensing are located at EA’s Redwood City, California
 14 headquarters. Similarly, the Northern District of California is a more convenient venue for likely
 15 third-party witnesses for both parties. For instance, Textron Innovation’s licensing agent for the
 16 purported trademarks and trade dress at issue here is based in San Diego, California.

17 For these reasons and others described below, this Court should deny Textron’s motion.

18 **II. BACKGROUND**

19 EA is one of the world’s leading developers and publishers of computer and videogames.
 20 Among EA’s expressive works is *Battlefield 3*, which it released on October 25, 2011. EA
 21 maintains its principal place of business in Redwood City, California. Compl. (Doc. No. 1) ¶ 11.

22 **A. EA’s Expressive Work *Battlefield 3***

23 *Battlefield 3* is a first-person, interactive combat simulation videogame built upon an
 24 original “ripped-from-the-headlines” story. *See* Compl. ¶ 16. Set in the year 2014, the game
 25 allows players to assume command of United States soldiers dispatched to stop a terrorist plot
 26 involving nuclear weapons near the Iran-Iraq border. *Id.* The game realistically and
 27 authentically depicts modern-day armed conflict on land, in air and at sea. *Id.* One of the ways
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Battlefield 3 accurately depicts military combat is by giving game players control of the weapons, accessories and vehicles—from tanks and jeeps to jets and naval assault vehicles—used by the United States military. *Id.* Among the more than twenty-five different modern-day vehicles built by a variety of manufacturers depicted in *Battlefield 3* are the Bell-manufactured AH-1Z, UH-1Y and V-22 helicopters. *Id.*

EA's depiction of the Bell-manufactured helicopters is directly relevant to the game's storyline and is indistinguishable from the reference and use of such vehicles in countless realistic war-themed books and movies, for which no license is necessary. *See* Compl. ¶ 18. Additionally, EA's depiction of the Bell-manufactured helicopters in its expressive work in no way misleads consumers as to the source or content of the work. *Id.* ¶ 19. Nothing in or related to the game contains any indication that Plaintiffs endorse the game or had a role in producing it. *Id.* Indeed, the packaging of *Battlefield 3* contains an explicit disclaimer that the depiction of any weapon or vehicle in the game does *not* indicate affiliation, sponsorship or endorsement by any weapon or vehicle manufacturer. *Id.* Moreover, the Bell-manufactured helicopters are not highlighted or given greater prominence than any of the other vehicles within the game. *Id.*

B. The Dispute Between EA and Textron

On October 7, 2011, pursuant to a previously executed agreement, EA informed Textron Innovations of the release of *Battlefield 3* and that the game would contain virtual images of three Bell-manufactured helicopters. *See* Lauridsen Decl., Ex. A. Contrary to Textron's assertion, Mot. at 2:12-15, negotiations did not "ensue[]" and escalate[]" following this notice. Rather, on October 21, 2011, Textron Innovations responded by asserting that EA must obtain a license to use virtual images of the Bell helicopters in its expressive work and that unlicensed use could constitute trademark and trade dress infringement.² *See* Lauridsen Decl., Ex. B. Textron

² Textron has pursued trademark and trade dress claims against EA in the past, filing a lawsuit in the Northern District of Texas on December 1, 2006 regarding a different EA videogame. *See Bell Helicopter Textron Inc. v. Electronic Arts Inc.*, 06-cv-0841 (N.D. Tex.). That action was dismissed following the court's denial of EA's motion to dismiss the complaint for failure to state a claim—the only substantive motion filed by either party in the case—and a subsequent settlement reached between the parties.

1 Innovations requested more information so that it could determine whether EA would be
2 “granted a license” for its depiction of Bell-manufactured helicopters in *Battlefield 3*.

3 On November 7, EA responded with a categorical rejection of Textron’s position and its
4 demand for a license. EA stated that its virtual depiction of military vehicles in its expressive
5 work *Battlefield 3* was protected by the First Amendment and did not constitute trademark or
6 trade dress infringement. *See* Lauridsen Decl., Ex. C. EA did not engage Textron in licensing
7 discussions. Just the opposite—EA stated “**we do not believe a license is necessary.**” *Id.*
8 (emphasis added). EA’s position was unequivocal, and the November 7 letter did not request a
9 response from Textron.

10 On December 21, 2011, EA received a letter from the same litigators representing
11 Textron in the Texas Action. In the letter, the litigators informed EA that they represented
12 Textron Inc., Bell Helicopter Textron Inc., and Textron Innovations Inc. (collectively “Textron”)
13 and demanded that EA cease depicting Bell-manufactured helicopters in its expressive works,
14 including *Battlefield 3*. *See* Lauridsen Decl., Ex. D. This letter also introduced new allegations
15 regarding packaging and instruction materials used in connection with *Battlefield 3*. *Id.* The
16 letter did not contain a deadline for EA’s response—nor would one have made sense because
17 there was no ongoing discussion between the parties. *Id.* Rather, the letter contained a general
18 threat that Textron would seek “legal remedies” if EA did not immediately cease use of the
19 purported marks and compensate Textron for “past use.” *Id.* In a declaration filed in support of
20 Textron’s motion, the President of Textron Innovations confirms that, upon sending the
21 December 21 letter, “Textron Innovations was prepared to enforce its rights.” Doc. No. 37
22 (Runstadler Decl.) ¶ 18.

23 On January 5, 2012, EA confirmed receipt of the December 21 letter. *See* Lauridsen
24 Decl., Ex. E. EA also informed Textron that it had investigated one of the new allegations
25 contained in the December 21 letter, regarding packaging and instruction materials, and found no
26 support for Textron’s allegations. *Id.* EA offered to review any additional evidence that Textron
27 claimed to possess for those specific allegations only—“packaging and instruction manuals,” not
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1 the game itself. EA did not offer to discuss a license with Textron.

2 On January 6, 2012, EA filed this action against Textron. EA seeks a declaration that
3 EA's expressive work *Battlefield 3* does not infringe trademarks or trade dress held by Textron.
4 EA alleges, in part, that its identification and depiction of Bell-manufactured helicopters in
5 *Battlefield 3* are protected by the First Amendment and the doctrine of nominative fair use. EA
6 served all three defendants on the next business day following the filing.³ See Doc. Nos. 9-11.

7 In late January 2012, Textron's California lawyers requested an extension of time to
8 respond to this action. See Lauridsen Decl. ¶ 23. On January 30, 2012, Textron and EA
9 stipulated to a 30-day extension of the California Action response date, placing the deadline on
10 February 29, 2012. See Doc. No. 17. At no time during this discussion did Textron or its
11 lawyers inform EA that it intended to file a duplicative action in Texas, challenge EA's decision
12 to file the California Action, or contest this Court's jurisdiction to hear the California Action.

13 On February 24, 2012, seven weeks after EA filed this action and over a month after
14 Textron's California lawyers asked for an extension of time to respond to it, Textron Innovations
15 and Bell Helicopter Textron filed the Texas Action. They assert, *inter alia*, that EA's depiction
16 of Bell-manufactured helicopters constitutes trademark and trade dress infringement. Textron
17 Inc. is a defendant in this action but is not a party in Texas.

18 On March 12, 2012, EA filed a motion in the Northern District of Texas to transfer the
19 Texas Action to this court. EA argues that the Texas Action should be transferred under the
20 first-to-file rule or, alternatively, for convenience under 28 U.S.C. § 1404(a). The parties
21 anticipate that briefing will be complete in the Northern District of Texas on April 16, 2012.

22 **III. ARGUMENT**

23 **A. The Court Should Retain Jurisdiction Over EA's Declaratory Judgment** 24 **Action.**

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27 ³ Despite service of the Complaint on all defendants within one business day, see Doc.
28 Nos. 9-11, Textron incorrectly asserts that EA "remained mum about the suit for one week."
Mot. at 6:22-23.

1 **1. Textron’s Threat of “Legal Remedies” Provides a Valid Basis for**
 2 **Declaratory Judgment Jurisdiction.**

3 “The purpose of the Declaratory Judgment Act is to give litigants an early opportunity to
 4 resolve federal issues to **avoid ‘the threat of impending litigation.’**” *Biodiversity Legal Found.*
 5 *v. Badgley*, 309 F.3d 1166, 1172 (9th Cir. 2002) (emphasis added). “[A]n action for a
 6 declaratory judgment that a patent [or trademark] is invalid, or that the plaintiff is not infringing,
 7 [presents] a case or controversy if the plaintiff has a real and reasonable apprehension that he
 8 will be subject to liability if he continues to manufacture his product.” *Rhoades v. Avon Prods.,*
 9 *Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007) (alterations in original; quoting *Hal Roach Studios,*
 10 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555-56 (9th Cir. 1990)).

11 Courts routinely retain jurisdiction over declaratory judgment actions filed following
 12 threats of trademark litigation by the declaratory judgment defendant. For example, in *Rhoades*,
 13 the Ninth Circuit found that the plaintiff possessed a “reasonable apprehension of an
 14 infringement suit” based on allegations that “1) Avon’s lawyer specifically threatened a
 15 trademark infringement suit at a meeting; 2) Avon’s counsel wrote a letter threatening
 16 ‘additional proceedings or litigation’; and 3) Avon’s counsel told [plaintiff’s] counsel that Avon
 17 would not give up its right to damages.” *Rhoades*, 504 F.3d at 1158 (emphasis added); *see also*
 18 *Societe de Conditionnement en Aluminium v. Hunter Eng’g Co.*, 655 F.2d 938, 944 (9th Cir.
 19 1981). In *Sony Computer Entm’t Am. Inc. v. Am. Med. Resp., Inc.*, 2007 WL 781969, at *1
 20 (N.D. Cal. Mar. 13, 2007), a trademark owner sent a draft complaint to an allegedly infringing
 21 videogame company and warned that “the complaint might be filed without further notice” if the
 22 company did not cease all uses of the mark within ten days. The videogame company filed its
 23 declaratory judgment complaint the first business day after the ten-day deadline expired because
 24 “Defendant threatened legal action against Plaintiff” and “Plaintiff perceived the possibility of a
 25 future suit.” *Id.* at *1 & *5. These threats of litigation prior to the filing of the plaintiff’s
 26 declaratory judgment action did not make the exercise of jurisdiction improper—they provided
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the basis for the courts' declaratory judgment jurisdiction.⁴

Here, the Court should reject Textron's claim that declaratory judgment jurisdiction is improper. Textron first demanded that EA take a license to its purported trademarks and trade dress on October 21, 2011, and a justiciable conflict between the parties was created as of November 7, 2011, when EA unequivocally rejected Textron's demand that it pay a licensing fee. See Lauridsen Decl., Exs. B & C. On December 21, 2011, Textron sent EA another letter reiterating the same licensing demand that EA had already rejected on November 7. See *id.*, Ex. D. At no point did EA negotiate with Textron, or even indicate a willingness to negotiate. Textron's unilateral requests that EA seek a license from it did not transform their letter exchange into a negotiation. To the contrary, it was clear from this exchange that both parties were fixed on their original positions, and either party was free to seek judicial relief at that time. Accordingly, more than two weeks after Textron's December 21 letter—and nearly two months after telling Textron that EA would not take a license—EA filed this action to ensure that Textron's unreasonable demands would not leave an indefinite cloud over the just-released *Battlefield 3* game.⁵

2. EA Did Not Engage in an Improper "Race to the Courthouse" or in Bad-Faith "Sham" Negotiations.

Contrary to Textron's claims, the threat of legal action alone does not make any subsequent declaratory judgment action filed against the threatening party an improper attempt to "race to the courthouse." Courts require evidence of some improper or unfair behavior by the plaintiff when declining to exercise declaratory judgment jurisdiction. See *Royal Queentex Ent., Inc. v. Sara Lee Corp.*, 2000 WL 246599, at *4 (N.D. Cal. Mar. 1, 2000) ("[T]he court was not

⁴ Until recently in the Federal Circuit, threats of litigation were not merely permissible grounds for declaratory judgment jurisdiction, but were required. See *Sony Elecs., Inc. v. Guardian Media Techs., Ltd.*, 497 F.3d 1271, 1284 (Fed. Cir. 2007).

⁵ EA had reason to believe that Textron would use its allegations to create open-ended uncertainty over EA's expressive work. In Bell's 2006 dispute with EA over a different game, nearly six months passed between Bell's initial, unsuccessful licensing demand and its eventual infringement action against EA. See Lauridsen Decl., Exs. F & P. Here, EA has a right to seek declaratory relief to avoid a similar extended period of uncertainty regarding the newly-released *Battlefield 3* game.

1 penalizing plaintiff for winning the race to the courthouse; rather, the court penalized plaintiff for
 2 the tactics used to win the race.”). All the cases cited by Textron involve improper or unfair
 3 litigation tactics not present here, such as filing immediately upon the threat of litigation or ruse
 4 settlement negotiations. There is no equitable reason, therefore, for the Court to decline
 5 declaratory judgment jurisdiction.

6 Textron had ample time to file its own action following EA’s rejection of its demand for
 7 a license and Textron’s subsequent threat of legal action. EA’s conduct therefore does not
 8 resemble the cases cited by Textron in which the plaintiff immediately—within 24 hours of
 9 receiving the threat—filed a declaratory judgment action. *See Schmitt v. JD Edwards World*
 10 *Solutions Co.*, 2001 WL 590039, at *1 (N.D. Cal. May 21, 2001) (declaratory judgment action
 11 filed same day as litigation threat and by which defendant had promised to file an action); *DeFeo*
 12 *v. Procter & Gamble Co.*, 831 F. Supp. 776, 777 (N.D. Cal. 1993) (declaratory judgment action
 13 filed the same day as litigation threat);⁶ *Tempco Elec. Heater Corp. v. Omega Eng’g, Inc.*, 819
 14 F.2d 746, 747 (7th Cir. 1987) (declaratory judgment action filed the same day as defendant’s
 15 statement that it would file action). Here, more than two weeks passed from Textron’s threat of
 16 litigation to EA’s filing—not to mention the two months since EA equivocally told Textron that
 17 it did not need a license for its expressive work. EA was not required to wait for an indefinite
 18 period before seeking judicial relief from the cloud of Textron’s allegations and threats of legal
 19 action.

20 Moreover, EA did nothing—let alone anything misleading—to delay Textron from filing
 21 an action. This action does not resemble cases cited by Textron in which declaratory judgment
 22 plaintiffs initiated “ruse” settlement negotiations and/or requested extensions of compliance
 23 deadlines to allow them to race to court. *See Xoxide, Inc. v. Ford Motor Co.*, 448 F. Supp. 2d
 24 1188, 1191 (July 21, 2006) (plaintiff repeatedly requested compliance-deadline extensions and
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26 ⁶ The language Textron cites from *DeFeo* also is dicta. *See Mot.* at 7:14-16. The *DeFeo*
 27 court declined jurisdiction based on the presence of an overlapping state action. 831 F. Supp. at
 28 778. “In such cases, there is a presumption that the entire suit should be heard in state court.”
Id. No such state action exists here.

1 filed a declaratory judgment action during the extra time granted by defendant); *Z-Line Designs,*
 2 *Inc. v. Bell'o Int'l LLC*, 218 F.R.D. 663 (N.D.Cal. Oct. 29, 2003) (plaintiff repeatedly requested
 3 compliance-deadline extensions and filed a declaratory judgment action the day before the final
 4 deadline expired); *Charles Schwab & Co. v. Duffy*, 49 U.S.P.Q. 2d 1862, 1864 (N.D. Cal. Dec. 8,
 5 1988) (plaintiff sent defendant a letter “that may have misled [defendant] as to [plaintiff’s]
 6 settlement intentions”).⁷

7 Here, Textron never set a deadline by which it would file an action and EA never
 8 requested more time to negotiate. EA did not engage in any negotiations, or do anything else
 9 that could have led Textron to delay a lawsuit. Textron attempts to portray a single January 5,
 10 2012 email as “feigning interest in pursuing an amicable resolution outside of the courts.” Mot.
 11 at 9:1-4. But at the time EA sent the email, it had already rejected Textron’s demands regarding
 12 the game itself. As the text of the email makes clear, EA was responding only to Textron’s new
 13 allegations regarding packaging and instructions and it expressly told Textron that EA had found
 14 no support for those allegations. *See* Lauridsen Decl., Ex. E. The email contains no indication
 15 that EA had moved from its established position that it needed no license and was not infringing
 16 Textron’s marks.

17 Significantly, Textron fails to assert that it in fact delayed filing an action based on any
 18 statements or conduct of EA, including the January 5 email on which it so heavily relies. The
 19 record is similarly bereft of any circumstantial support for such a claim. Indeed, Textron’s post-

21 ⁷ The cases Textron cites from other district and circuits similarly all involve ruse
 22 settlement negotiations or deadline extensions, and therefore provide no support for declining
 23 jurisdiction here. *See AmSouth Bank Dale*, 386 F. 3d 763, 790 (6th Cir. 2004) (plaintiff sent
 24 letters indicating that settlement negotiations were ongoing, stated that it was considering
 25 defendant’s settlement offer and offered to schedule a meeting before filing declaratory judgment
 26 action the next day); *ivi, Inc. v. Fisher Commc’ns, Inc.*, 2011 WL 197419, at *1-2 (W.D. Wash.
 27 Jan 19, 2011) (plaintiff sent letters expressing desire to negotiate, then filed declaratory judgment
 28 action day before compliance deadline); *Topics Entm’t Inc. v. Rosetta Stone Ltd.*, 2010 WL
 55900, at *1-2 (W.D. Wash. Jan. 4, 2010) (plaintiff filed declaratory judgment action while
 awaiting defendant’s settlement offer and despite a prior agreement that no party would file an
 action without further communication).

filing conduct contradicts any inference that it was on the verge of filing an action but for EA's conduct. Textron's first response to this action was to seek an additional month to respond to it. *See* Doc. No. 17. Only on the eve of that extended response date—seven weeks after EA's filing—did Textron file its own action in the Northern District of Texas. This is not a case, like many of those cited by Textron, where the parties' complaints are filed within hours or days of each other. Textron's delay in pursuing its own case is further evidence that the California Action cannot be deemed improper anticipatory litigation.

B. The First-To-File Rule Applies Here.

“The first-to-file rule states that when two suits are pending involving the same parties and issues, the action filed first ordinarily should proceed to judgment.” *Bryant v. Oxxford Express, Inc.*, 181 F. Supp. 2d 1045, 1048 (C.D. Cal. 2000). The rule “was developed to ‘serve[] the purpose of promoting efficiency well and should not be disregarded lightly.’” *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). “Three threshold factors should be considered in deciding whether to apply the first-to-file rule: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues.” *Bryant*, 181 F. Supp. 2d at 1048 (enjoining subsequently-filed trademark infringement action in favor of first-filed declaratory judgment action). Because this action satisfies all three factors, the Court should allow it to proceed to judgment and deny Textron's motion to dismiss, stay or transfer.

Textron does not dispute that the Texas Action was filed seven weeks after this one. *See* Mot. at 6-7. Moreover, Textron's motion concedes, for good reason, that there is nearly complete overlap between this action and the subsequently-filed Texas Action. *See* Doc. No. 37 ¶ 21 (“The Current Texas Action relates to EA's use of the Products-in-Suit in the ‘Battlefield 3’ games and related advertising, just as the California Action does.”). The actions involve the same parties (EA, Bell Helicopter Textron Inc., and Textron Innovations Inc.), the same expressive work (*Battlefield 3*) and the same federal legal issues (whether EA's depiction of Bell-manufactured helicopters in *Battlefield 3* constitutes trademark and trade dress infringement and, relatedly, whether EA's use of Textron's alleged marks in its expressive work is protected

1 by the First Amendment and the doctrine of nominative fair use). *See id.*, Ex. G.⁸

2 Textron needlessly subjected the court system and EA to unnecessary and inefficient
3 litigation when it knowingly filed a subsequent duplicative action in the Northern District of
4 Texas. To prevent such wasteful tactics, it is within this Court’s discretion to enjoin Textron
5 from pursuing the Texas action. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d
6 834, 843 (9th Cir. 1986). At a minimum, the Court should deny Textron’s motion and retain
7 jurisdiction over EA’s undisputedly first-filed action.

8 Because Textron cannot escape the general application of the first-to-file rule, it argues
9 that this case is exceptional and warrants a rare departure from that rule. But as explained below,
10 “Defendants have provided [no] evidence of bad faith, anticipatory suit, or forum shopping that
11 would distinguish this case from virtually any declaratory judgment action in which a party could
12 show a reasonable threat of suit so as to satisfy the case or controversy requirement.” *Barnes &*
13 *Noble, Inc. v. LSI Corp.*, --- F. Supp. 2d ---, 2011 WL 4948598, at *10 (N.D. Cal. Oct. 18, 2011).

14 **1. EA’s first-filed action was not improperly anticipatory.**

15 “Generally a suit is anticipatory when the plaintiff filed its suit upon receipt of **specific,**
16 **concrete indications** that a suit by the defendant was imminent.” *Ward v. Follett Corp.*, 158
17 F.R.D. 645, 648 (N.D. Cal. 1994) (emphasis added). As previously discussed regarding
18 declaratory judgment jurisdiction, “specific, concrete indications” of an imminent action include
19 a deadline for compliance or express indication regarding when a suit will be filed. The two
20 cases Textron relies upon in arguing that EA’s action was anticipatory—*Z-Line Designs* and
21 *Xoxide*—include such indications. In *Z-Line Designs*, 218 F.R.D. at 664, “defendant’s counsel
22 set a ‘final deadline of July 30,’ and asserts that he made clear to Z-Line that Bell’O would file
23 suit if Z-Line did not agree to settlement.” Z-Line filed a declaratory judgment action on July
24 29, two days before Bell’O followed through on its threat and filed its own action. *Id.* at 665.

25
26 ⁸ Textron’s tag-along Texas trademark and dilution claims—assuming they are more than
27 simply a means of attempting to manufacture a greater connection to Texas—may be brought
28 here as counterclaims.

1 Similarly, in *Xoxide*, 448 F. Supp. 2d at 1191, the defendant demanded that Xoxide return an
 2 executed settlement agreement by March 23, 2006. On March 23, Xoxide responded with a
 3 letter labeled “confidential settlement discussion and offer” that requested “2 to 3 business days
 4 to complete [its] consideration and response.” *Id.* Six business days later and with no further
 5 communications indicating that it was rejecting the settlement offer, Xoxide filed its declaratory
 6 judgment action. *Id.*

7 In contrast to declaratory judgment actions motivated by such “specific, concrete
 8 indications,” filing a declaratory judgment action when faced with more generalized threats is
 9 not improper anticipatory litigation. “[A] letter which suggests the possibility of legal action ...
 10 in order to encourage or further a dialogue[] is not a specific, imminent threat of legal action.”
 11 *Intersearch Worldwide, Ltd. v. Intersearch Group, Inc.*, 544 F. Supp. 2d 949, 960 (N.D. Cal.
 12 2008) (citations and quotations omitted). “[T]here is no requirement that a business threatened
 13 with the *possibility* of an infringement lawsuit wait to be served.” *Id.* at 961. For example, in
 14 *Royal Queentex Ent.*, 2000 WL 246599, at *1, defendant stated in a threat letter that it was
 15 “willing to forego legal action to enforce its rights only if we receive prompt written assurances
 16 that [plaintiff] will immediately discontinue all us [sic] of any name containing [the marks].”
 17 The court found that the letter “constituted specific, concrete indications of a legal dispute,”
 18 sufficient to justify declaratory judgment jurisdiction, “but not specific, concrete indications that
 19 suit was imminent,” sufficient to make the declaratory judgment action improperly anticipatory.⁹
 20 *Id.* at *5.

21 Textron’s December 21, 2012 letter to EA, containing language almost identical to the
 22

23 ⁹ See also *Summit Entm’t, LLC v. Bath & Body Works Brand Mgmt., Inc.*, 2011 WL
 24 2649973, at *1 (C.D. Cal. July 5, 2011) (“[T]he Court finds that Summit’s cease and desist
 25 letters did not use explicit language signifying that a lawsuit was imminent.”); *Xtended Beauty v.*
 26 *Xtreme Lashes*, 2007 WL 2669895, at *2 (N.D. Cal. Sept. 7, 2007) (“This letter at best supports
 27 an inference that Plaintiff filed suit in California with some knowledge that Defendant might
 28 later file suit.”); *Bryant*, 181 F. Supp. at 1048 (“Such language no doubt put Bryant on notice
 that [Oxxford] was at least considering filing suit against [him]. [Oxxford’s] letter, however,
 gave no indication that a lawsuit was imminent, or that [Oxxford] was doing anything more than
 blowing smoke about a potential lawsuit.” (alterations in original; quotations and citations
 omitted)).

1 letter in *Royal QueenTex Enterprises*, does not constitute a “specific, concrete indication[] that a
 2 suit by the defendant was imminent.” *Ward*, 158 F.R.D. at 648. The Textron letter states:

3 Demand is hereby made that EA immediately cease the uncompensated use of our
 4 clients’ intellectual property rights and to compensate our clients for past use.
 5 Failure to do so will force our clients to seek legal remedies to protect their
 6 property rights and goodwill.

7 Lauridsen Decl., Ex. E. Although the letter references “legal remedies,” it neither specifies when
 8 Textron will file a lawsuit, nor that EA must agree to a license by a concrete date to avoid
 9 litigation. If such general language were sufficient to render EA’s declaratory judgment filing
 10 improperly anticipatory, then nearly any threat letter would allow the threatening party to hold
 11 the target “in limbo indefinitely” on “a mere possibility” of litigation. *Intersearch Worldwide,*
 12 *Ltd.*, 544 F. Supp. 2d at 961.

13 Moreover, the time that passed between EA’s rejection of Textron’s licensing demand
 14 and EA’s declaratory judgment filing demonstrates that the action was not improperly
 15 anticipatory. *See Puri v. Heathside Food Solutions LLC*, 2011 WL 6257182, at *3 (C.D. Cal.
 16 Dec. 13, 2011) (holding that declaratory judgment action is not improperly anticipatory because
 17 “settlement discussions proved futile.”); *Summit Entm’t*, 2011 WL 2649973, at *1 (same). This
 18 is not a case, as Textron suggests, where application of the first-to-file rule would “thwart
 19 settlement negotiations” or “encourage[] intellectual property holders to file suit rather than
 20 communicate with an alleged infringer.” Mot. at 10:16-18. The parties clearly communicated
 21 their respective positions—Textron told EA that it must take a license on October 26, 2011; EA
 22 rejected the licensing demand on November 7, 2011. In the nearly two months between EA’s
 23 letter and its filing, there were no settlement negotiations to be thwarted. Textron’s December
 24 21, 2012 letter merely reiterated the already-rejected licensing demand, and EA waited more
 25 than two weeks after receipt of it to file this action.

26 **2. EA’s first-filed action was not the result of forum shopping.**

27 “[Plaintiff’s] decision to sue in its home forum of California does not amount to
 28 impermissible forum shopping.” *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1082 (C.D.
 Cal. 1999); *see also Acclarent, Inc. v. Quest Med., Inc.*, 2006 WL 2982301, at *4 (N.D. Cal. Oct.

17, 2006) (same). “A plaintiff does not engage in forum shopping simply by choosing to file suit in the most convenient forum available to it.” *Adidas Am., Inc. v. Herbalife Int’l, Inc.*, 2010 WL 596584, at *2 (D. Or. Feb. 12, 2010); *see also Summit Entm’t*, 2011 WL 2649973, at *1 (C.D. Cal. July 5, 2011) (finding no forum shopping because party “persuasively demonstrated that it had substantial connections to warrant filing the suit in [the forum].”). Additionally, forum shopping typically involves a legal advantage for plaintiff in the chosen forum. *See Intersearch Worldwide*, 544 F. Supp. 2d at 962.

EA did not engage in improper forum shopping by filing this action. EA maintains its principal place of business in Redwood City, California, which is located in the Northern District of California. The Northern District of California is the venue where a substantial number of the events at issue took place and witnesses central to these cases are located. *See Compl.* ¶ 11. Moreover, Textron does not argue that filing in this district gives EA any legal advantage. Both this Court and the Northern District of Texas will apply federal trademark, trade dress and constitutional law to this action. Thus, the Northern District of California is neither inappropriate nor abusive—it is the demonstrably logical and proper venue for resolution of both the California Action and Textron’s subsequently-filed claims against EA.

Finally, contrary to Textron’s insinuations, the limited 2006 litigation between EA and Textron does not demonstrate that EA engaged in forum shopping by filing this action in the Northern District of California. The only case Textron cites in support of considering prior litigation is easily distinguishable. In *Alexander v. Franklin Resources, Inc.*, 2007 WL 518859, at *2-3 (N.D. Cal. Feb. 14, 2007), the plaintiff accused of forum shopping filed suit in a foreign forum with little connection to the action while a similar, long-pending matter was progressing to conclusion in his home district. If the plaintiff had filed in his home district, the new action likely would have been consolidated with the pending one and subject to its adverse rulings as law of the case.

Here, the prior litigation between EA and Textron concluded more than four years ago after a single substantive filing and a voluntary dismissal. Textron does not argue—nor could

it—that the two-page order issued in the 2006 litigation is binding on this action, as it involved a different EA videogame and different purported trademarks and trade dress.¹⁰ Moreover, this action will be decided according to five years of new, directly-applicable case law . Since the 2006 litigation, numerous courts, including the Supreme Court, have clarified the broad First Amendment protection for videogames—including protection from trademark claims targeting the use of marks within expressive works. *See, e.g., Brown v. E.M.A.*, 131 S. Ct. 2729, 2737 n. 4 (2011) (holding that videogames “are as much entitled to the protection of free speech as the best of literature.”); *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1101 (9th Cir. 2008) (affirming dismissal as matter of law on First Amendment grounds federal trademark and related state law claims alleging videogame’s use of mark); *Dillinger LLC v. Electronic Arts Inc.*, 2011 WL 2457678, at *4-8 (N.D. Ind. June 16, 2011) (holding that the First Amendment bars federal trademark and related state law claims alleging videogames’ use of mark).

3. EA’s first-filed action was not filed in bad faith.

EA’s refusal to negotiate for an unreasonable, unnecessary license does not constitute bad faith. A plaintiff may file a declaratory judgment action “to ‘cut to the chase’ and resolve the conflict as soon as possible once it reasonably believed it was not infringing the subject [trademarks].” *Barnes & Noble*, --- F. Supp. 2d ---, 2011 WL 4948598, at *10. For example, in *Intersearch Worldwide*, 544 F. Supp. 2d at 961, the court held that plaintiff’s decision to file its declaratory judgment action because “settlement negotiations were not proceeding well does not show bad faith.” Here, EA had already rejected all of Textron’s demands when it filed the declaratory judgment action and there were no ongoing negotiations.

Textron argues that it will be forced to “sue first; ask later” if EA’s declaratory judgment action is allowed to proceed. Mot. at 14:5-8. But the two cases cited by Textron as analogous

¹⁰ Under Textron’s baseless reasoning, EA would engage in forum shopping if, finding itself in repeat litigation against a party to whom it previously lost a motion, EA did not file the action in the district where it lost that motion. This is not and should not be the law.

instances of bad faith—*Xocide* and *Z-Line Designs*—are easily distinguishable here because EA was not engaged in settlement negotiations when it filed this action. Textron had requested and EA had rejected taking a license for *Battlefield 3* nearly two months before EA filed this action. *See* Lauridsen Decl., Ex. C. EA’s January 5, 2012 email did not indicate any shift in EA’s position or a new desire for settlement negotiations. Just the opposite—in a portion of the email not quoted by Textron, EA expressly rejects the only new allegations contained in Textron’s December 21, 2011 letter. EA’s request for additional information is similarly limited only to those already-rejected allegations:

Your letter claims that EA’s *Battlefield 3* game uses your client’s trademarks and trade dress on “**product packaging and instruction manuals.**” I have investigated this within EA but **haven’t been able to find any support for your statement.** I’d appreciate it if you could send me any evidence that you have identified of these uses.

Lauridsen Decl., Ex. E (emphasis added). The January 5 email does not demonstrate that EA’s action was in bad faith, but rather that the action was entirely appropriate because “EA reasonably believed it was not infringing the subject [trademarks].” *Barnes & Noble*, --- F. Supp. 2d ---, 2011 WL 4948598, at *10.

4. The balance of convenience weighs in favor of EA’s first-filed action.

For the reasons explained below, the balance of convenience weighs in favor of upholding the requirements of the first-to-file rule. The Northern District of California is a more convenient forum for this action than the Northern District of Texas.

C. The Court Should Not Transfer EA’s Action Because The Northern District of California Is The More Convenient Forum.

It is Textron’s burden to demonstrate that transfer is appropriate. *Commodity Futures Trading Comm’n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). “The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff’s choice of forum. *Decker Coal*, 805 F.2d at 843. “[U]nless the balance of factors is strongly in favor of the defendants, the plaintiff’s choice of forum should rarely be disturbed.” *Secs. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). As explained below, defendants have not only failed to meet this high standard, but the balance of

1 factors strongly favors allowing the action to proceed in California rather than Texas.

2 **1. EA's forum choice should be respected.**

3 EA's choice of the Northern District of California as the forum for this action weighs
4 against transfer. Textron's only argument against giving EA's forum choice preference—that
5 EA engaged in improper forum shopping by filing in its home district—is fully addressed above.
6 *See supra* Section III.B.2.

7 **2. Textron's repeated filing of trademark actions in California**
8 **demonstrates that it will not be inconvenienced by litigation here.**

9 Textron will not be inconvenienced by pursuing its trademark and trade dress claims in
10 California. To the contrary, Textron has repeatedly filed lawsuits in California federal courts,
11 demonstrating that it believes the state to be a convenient forum. As of 2010, the Textron
12 entities have filed and litigated at least four trademark and trade dress actions in California
13 federal courts—including at least one in the Northern District of California¹¹ In fact, Textron
14 resolved the Northern District of California action by entering into a settlement agreement
15 covering the same purported trademark and trade dress rights associated with the AH-1 and UH-
16 1 helicopter families that are at issue here and in the Texas Action. *See* Lauridsen Decl., Ex. H.
17 This demonstrates that Textron has found the Northern District of California to be a convenient
18 forum to enforce its purported trademark and trade dress rights. Before the recent Texas Action,
19 Textron had filed as many trademark claims in California as it had in Texas since 1998. *See*
20 Lauridsen Decl. ¶ 24. Textron's litigation activity in California makes sense, as the corporation
21 and its subsidiaries have numerous offices within the state including a Bell Helicopter sales
22 office. *Id.*, Ex. I.

23 In contrast to Textron's frequent and affirmative litigation in California, EA has never
24 filed suit in the Northern District of Texas and maintains no employees or offices in the district.

25 ¹¹ *See Textron Innovations Inc. et al. v. Banana Hobby Inc.*, 10-cv-7484 (C.D. Cal.);
26 *Textron Innovations Inc. and Bell Helicopter Textron Inc. v. Helicopter World Inc.*, 06-cv-6474
27 (N.D. Cal.); *Bell Helicopter Textron Inc. v. Hill Indus. Inc.*, 05-cv-1835 (C.D. Cal.); *Textron Inc.*
28 *v. Allfast Fastening Sys. Inc.*, 98-cv-8355 (dockets attached hereto as Exhibits Q through T to the
Lauridsen Declaration).

1 See Evans Decl. ¶ 8. As discussed, *supra*, EA appeared in the Northern District of Texas in 2007
 2 only after being sued by Textron for trademark infringement regarding a different videogame. It
 3 will be substantially inconvenienced by further litigation in the Northern District of Texas.
 4 Textron's assertion that EA's prior appearance in Texas will lead to more efficient litigation of
 5 this action is entirely speculative. The Texas Action is not before the court that heard the earlier
 6 litigation and, regardless, the entirety of EA's activity in that litigation consisted of a single
 7 substantive filing—a motion to dismiss pursuant to Rule 12(b). See Lauridsen Decl., Ex. F.
 8 Textron has failed to explain why the court to which the Texas Action is assigned—possessing
 9 no more familiarity with Textron's or EA's claims than this one—will provide a more efficient
 10 forum simply because it is in the same district as limited prior litigation between the parties.

11 **3. The Northern District of California will be more convenient for both**
 12 **party and third-party witnesses and will provide easier access to**
 13 **relevant evidence.**

14 “Intellectual property infringement suits often focus on the activities of the alleged
 15 infringer, its employees, and its documents; therefore the location of the alleged infringer's
 16 principal place of business is often the critical and controlling consideration in adjudicating
 17 transfer of venue motions.” *Houston Trial Reports, Inc. v. LRP Publications, Inc.*, 85 F. Supp.
 18 2d 663, 668 (S.D. Tex. 1999); see also *Barnes & Noble*, --- F. Supp. ---, 2011 WL 4948598, at
 19 *12 (N.D. Cal. Oct. 18, 2011) (holding that “the bulk of the relevant evidence usually comes
 20 from the accused infringer” in a patent infringement case); *Brackett v. Hilton Hotels Corp.*, 619
 21 F. Supp. 2d 810, 820 (N.D. Cal. 2008) (Alsup, J.) (same, in a copyright infringement case). This
 22 trademark action is no different. The Northern District of California is the location of EA's
 23 principal place of business, many of its employees who may have information relevant to the
 24 dispute, and relevant documents. The employees ultimately responsible for *Battlefield 3*'s
 25 marketing, public relations policy, website and licensing—issues Textron claims are relevant—
 26 are also found within the Northern District of California. See *id.* Ex., G ¶¶ 36-43; 49; Evans
 27 Decl. ¶¶ 6-7. Many documents related to the marketing and promotion of *Battlefield 3* are
 28 likewise located at EA's headquarters in the Northern District of California. Evans Decl. ¶ 5.

1 The Northern District of California, therefore, is the more convenient venue for access to the EA
2 witnesses and documents.

3 In contrast, the only defendant that Textron asserts is rightfully before this Court—
4 Textron Innovations—is a **Rhode Island**-based company. *See* Mot. at 17 n.8 (“Bell and Textron
5 Inc. intend to move to dismiss the claims against them for lack of subject matter jurisdiction.”).
6 Textron Innovations also brings five of the six counts in the Texas Action. Textron cannot
7 credibly assert that Texas is the more convenient forum for a Rhode Island-based, Delaware-
8 incorporated party to litigate intellectual property claims against a California-based
9 corporation—particularly when Textron has availed itself of California venues in the past to
10 protect its purported trademark and trade dress rights. But even if Bell Helicopter Textron and
11 Textron Inc. are rightfully before this Court, or to the extent Textron identifies any witnesses and
12 documents located in Texas, transfer based on those witnesses “would merely shift rather than
13 eliminate the inconvenience.” *Decker*, 805 F.2d at 843. Such burden shifting does not justify
14 granting a motion to transfer. *Id.*

15 Finally, the location of likely third-party witnesses—a factor not discussed by Textron—
16 similarly favors the Northern District of California. Textron’s allegations in the Texas Action
17 describe likely topics on which Textron will seek discovery regardless of whether this action is
18 transferred: Textron’s efforts to license their purported trademarks and trade dress, Compl. ¶¶
19 21-22, EA’s marketing of the *Battlefield 3* game, *id.* ¶¶ 36-43, and the design of the Bell
20 Helicopters, *id.* ¶ 20, among others. Numerous likely third-party witnesses on these topics reside
21 in California, elsewhere on the West Coast or, at a minimum, outside of the Northern District of
22 Texas. Textron Innovations’ licensing agent for these exact purported trademark and trade dress
23 rights, Equity Management Inc. is based in San Diego, California. Lauridsen Decl., Ex. J.
24 Northrop Grumman Aerospace Systems, which contributed systems to all three helicopters at
25 issue, is based in Redondo Beach, California. *See id.*, Exs. K-N. Boeing Corporation, which
26 jointly designed one of the helicopters at issue, was based during the design-period at issue in
27 Seattle, Washington, where it still maintains a large presence, and currently has its principal
28

1 place of business in Chicago, Illinois. *See id.*, Ex. O. The comparative proximity of this Court
 2 to these potential third-party witnesses further weighs against a finding that Textron has made a
 3 “strong showing” that the Northern District of California is an inconvenient forum.

4 **4. The Northern District of California and Northern District of Texas**
 5 **are equally familiar with applicable law.**

6 Both fora are equally qualified to rule upon the federal legal issues—statutory and
 7 constitutional—at the core of both EA’s and Textron’s complaints. Textron does not dispute this
 8 point, but instead attempts to shift consideration to purported “familiarity with the underlying
 9 facts.” Mot. at 18:6-14. But even focusing on factual familiarity does not weigh in favor of
 10 transfer. This action involves a different expressive work and a different Bell helicopter than the
 11 parties’ prior litigation. Even if the facts were the same, the Texas Action is not pending before
 12 the same court that heard the prior dispute. And even if the court was the same, any familiarity
 13 with the allegations in the five-year-old litigation would be de-minimis at most. As explained
 14 above, the court in that action did not hear discovery issues, review evidence, or indeed consider
 15 anything beyond the sufficiency of the allegations in Textron’s complaint.

16 Finally, the presence of purported Texas state-law claims in the Texas Action does not
 17 provide a basis for the transfer of this action. Even if Textron were to counterclaim here with
 18 Texas state-law claims—which it has not done, and therefore cannot rely upon for a transfer—
 19 the potential counterclaims would not change the Court’s transfer analysis because such tag-
 20 along claims will rise and fall with the federal ones. A finding that EA’s alleged use is protected
 21 under the First Amendment, for example, would defeat all of Textron’s claims. *See, e.g., E.S.S.*
 22 *Entm’t*, 547 F.3d at 1101. Similarly, a finding that Textron does not possess valid trademarks or
 23 trade dress would eliminate both federal and state grounds for recovery. *Id.* The Northern
 24 District of California and the Northern District of Texas are equally qualified to make these
 25 determinations.

26 **5. The Texas Action may be feasibly consolidated with this action.**

27 Textron’s only argument regarding the feasibility of consolidation is based on the
 28 assertion that Bell is not a proper declaratory judgment defendant here. This issue is not

properly before the Court—Bell could have raised it here, but opted not to—and therefore cannot serve as a basis for transfer.¹²

Moreover, consolidation of the California and Texas Actions would not require complete identity of parties or issues. *See* Fed. R. Civ. P. 42 (“If actions before the court involve a common question of law or fact....”). Textron has already conceded such factual and legal overlap here. *See* Doc. No. 37 at ¶ 21. And even if the Texas Action is not transferred to the Northern District of California, Bell does not argue that its claims in the Texas Action arise out of a different transaction and occurrence than the claims in the California Action. There are, therefore, a variety of procedural ways it could have its rights adjudicated in the California Action even if it is not properly a declaratory relief defendant.

6. The Northern District of California possesses a stronger localized interest in this action than the Northern District of Texas.

The Northern District of California has a strong localized interest in the conduct and rights of corporations—such as EA—based within its jurisdiction. “California has a strong public interest in deciding controversies involving its citizens.” *Jonathan Browning, Inc. v. Venetian Casino Resort, LLC.*, 2007 WL 4532214, at *6 (N.D. Cal. Dec. 19, 2007) (citing *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 771 (9th Cir. 1991)). This action fundamentally concerns EA’s conduct within the Northern District of California and EA’s rights to create expressive works without the impediment of constant threats of meritless litigation. In contrast, the Northern District of Texas does not share an equivalent localized interest in the purported rights of Textron Innovations, a Rhode Island-based intellectual property holding company, or Textron Inc., similarly based in Rhode Island. *See* Compl. ¶¶ 12-13. The Northern District of Texas’ interest in Bell’s licensing activity is also attenuated since,

¹² Both Bell and Textron Inc. are proper declaratory judgment defendants. The December 21 letter demanding that EA take a license or face “legal remedies” was sent on behalf of all three parties. *See* Lauridsen Decl., Ex. D (“We have been retained by Bell Helicopter Textron Inc. (‘Bell’), Textron Inc. (‘Textron’), and Textron Innovations Inc. (‘TII’) (collectively hereinafter our ‘clients’) in connection with the defense of our clients’ intellectual property rights.”). EA therefore had a reasonable basis for seeking declaratory relief that it was not infringing any of the three “clients’” purported trademarks or trade dress.

on information and belief, its third-party licensing agent is based in and operates from California. *See* Lauridsen Decl., Ex. J.

7. The relative congestion of the Courts does not favor transfer.

Given Textron's seven-week delay in filing the Texas Action, the marginal difference in court congestion between the Northern District of California and the Northern District of Texas should have no impact on the transfer decision. According to the most recent statistics,¹³ the median time from filing to disposition for civil cases in the Northern District of California is 8.0 months, compared to 6.6 months in the Northern District of Texas. This 1.4 month difference—slightly over six weeks—is less than the Texas Action lags behind this one.¹⁴ Any speculative time advantage to proceeding in the Northern District of Texas was therefore negated by Textron's seven-week delay in filing the Texas Action.

8. The balance of factors does not strongly favor transferring this action to Texas.

As explained above, the Section 1404(a) factors do not favor—let alone “strongly favor”—a transfer to the Northern District of Texas:

1. Plaintiff's choice of forum: favors California.
2. Convenience of the parties: favors California.
3. Convenience of the witnesses: favors California.
4. Ease of access to the evidence: favors California.
5. Familiarity of each forum with applicable law: neutral.
6. Feasibility of consolidation with other claims: neutral.
7. Local interest in the controversy: favors California.
8. Relative court congestion: neutral.

¹³ *See* <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsSep2011.aspx> (most recently accessed on March 1, 2012).

¹⁴ In its motion, Textron considers the median time from filing to trial. *See* Mot. at 19:9-12. This measure is less relevant to this case than EA's use of the filing-to-disposition comparison because EA intends to file at a dispositive motion at the earliest possible date.

1 Because not even a single factor favors the transfer of this action to the Northern District of
2 Texas, the Court should allow EA's action to proceed in the Northern District of California.

3 **IV. CONCLUSION**

4 For these reasons, Textron's motion should be denied.

5
6 Dated: March 14, 2012

KEKER & VAN NEST LLP

7
8 By: /s/ R. James Slaughter
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